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U.S. Citizenship and Immigration Services

[redacted]

FEB 11 2004

FILE: EAC 01 143 54036 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a global provider of computer-based business applications/systems that seeks to employ the beneficiary as a technology consultant. The director determined the petitioner had not established that the beneficiary was eligible for any further extensions.

On appeal, counsel provides additional information.

The director denied the petition reasoning that the record contained no evidence that the beneficiary fulfilled the requirements of sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21).

On appeal, counsel states, in part, as follows:

> [The] petitioner has filed both a[n] application for alien employment certification with the U.S. Department of Labor since June 29, 1998 . . . and [the] petition for immigrant worker was filed on March 28, 2002, and approved on May 13, 2002 . . . and the alien has filed the application for adjustment of status. . . .

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status except for the per-country limitations. (Emphasis added.) The petitioner has provided evidence of an approved I-140 petition on behalf of the beneficiary. Nevertheless, that petition was approved on May 13, 2002, a date subsequent to March 30, 2001, the filing date of the instant visa petition. Regulations at 8 C.F.R. § 103.2(b)(12) provide that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. Since this has not occurred, it is concluded that the petition may not be approved.

Section 106 of AC21 permits H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year period when:

> (a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and
>
> (b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

The record contains evidence of a labor condition certification application that was filed on behalf of the beneficiary on June 29, 1998. As stated previously, however, as the I-140 petition that was filed on behalf of the beneficiary was approved on May 13, 2002, subsequent to the filing date of the instant visa petition, the petitioner has not established eligibility. As such, the record does not demonstrate that the beneficiary is eligible for benefits provided for in AC21. In view of the foregoing, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed. The petition is denied.